the legal fiction where the parties to the collective agreement may be set free to renegotiate for new terms.

The proper approach to the construction of Clauses 1(b) and (c) of the agreement must be such so as to give meaning to the system of collective bargaining between employers and employees. Otherwise it will result in an absurd situation whereby the workers' benefits achieved as a result of collective bargaining will be reduced to nought at the end of every three years when the parties wish to renegotiate for a new collective agreement. Surely that is not the intention of the parties. Surely it is also not the intention of Parliament to allow the benefits enjoyed by the workers for the three years to lapse altogether and the renegotiation to begin from scratch. There must be continuity and stability in the relationship of employers and workmen otherwise there will be chaos in industrial relations. In my view, Abdul Razak J. overlooked these broad objectives of Industrial Relations law when he gave too much emphasis on the technicality of the law of contract of employment. In *United Engineering Workers Union* v. *Devanayagam*[12] Lord Guest and Lord Devlin gave a dissenting judgment on the question whether the office of president of a labour tribunal was not a judicial office within the meaning of section 55 of the Ceylon Constitution but in their dissenting judgment the two law Lords made a pertinent observation on the true perspective of the law of industrial relations in relation to the common law of master and servant. At page 377 the judgment reads:

"It is commonplace that with respect to industrial relations the common law of master and servant has fallen into disuse. Disputes about conditions of employment are not usually settled by the courts in accordance with the terms, express or implied, of the contract of service. Trade unionism could no doubt have used its increased bargaining power to obtain more realistic and elaborate contracts of service within the framework of the old common law, but it preferred to use it to seek advantages irrespective of contract and enforceable not by legal machinery but by the threat of the strike. The law has therefore had to make a new entry into the field of industrial relations. It has had to start again from the beginning, and, as in the field of international relations, has had to make its way in by formulating methods of securing the peaceful settlement of disputes."

The words "as from such date and for such date and for such period as may be specified in the collective agreement" appearing in sub-section 2 of section 17 of the Act should be construed in the context of the section in which they appear. No collective agreement taken cognisance of by the court shall be varied or replaced except by a subsequent agreement or a decision of the court.

Mr. Xavier may have conceded that the collective agreement in this case omitted to include a continuing clause but that does not have any legal effect. It could at best amount to *ex abundanti cautela.*

It is my view therefore that the Harun Court had jurisdiction to hear the complaint under section 56 of the Act and to make Award No. 6/81 and it had not committed any jurisdictional errors in arriving at the award. The appeal should accordingly be allowed with costs and the order of the High Court be set aside. Deposit to the appellant.

Appeal dismissed.

Solicitors: *D.P. Xavier & Co.; T.M. Varughese & Co.*

GANESAN & ANOR. v. BASKARAN

[S.C. (Abdul Hamid C.J. (Malaya), Lee Hun Hoe C.J. (Borneo) & Hashim Yeop A. Sani S.C.J.) June 12, & December 27, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal No. 286 of 1984]

Contract – Sale of land – Restriction in interest – Land not transferable without consent of Ruler in Council – Whether there was oral promise to obtain such consent – Whether condition precedent – Triable issue – Evidence Act, 1950, s. 92.

Practice and Procedure – Application for rescission of agreement of sale and forfeiture of deposit – Triable issue – R.H.C. 1980, O.56 r. 2.

In this case the appellants had agreed to buy land belonging to the respondent and had paid a deposit of $20,000/-. There was a restriction in the document of title that the land could not be transferred without the consent of the Ruler in Council. No such consent was obtained but the respondent applied for the rescission of the contract and the forfeiture of the deposit on the ground that the appellants had failed to complete the transaction and that time was of the essence of the contract. The learned trial judge at first heard the application in chambers and dismissed it. However after hearing further arguments in open court he reversed the decision and allowed the application. He formed the view that time was the essence of the contract and therefore the respondent had properly terminated the agreement and forfeited the deposit. The appellants appealed.

Held: (1) the central question that arose for determination in this case is whether the respondent did orally promise that he would obtain the consent of the Ruler in Council necessary for the transfer. There was therefore an issue to be tried;

(2) evidence relating to the separate oral agreement is admissible under proviso (c) of section 92 of the Evidence Act and the appellants should have been permitted to adduce evidence to prove the existence of such a promise;

(3) there were issues which must be resolved at the trial and therefore the appeal should be allowed.

Cases referred to:-

(1) *Yong Ung Kai* v. *Enting* [1965] 2 M.L.J. 98.
(2) *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] 1 Ch. 129.

SUPREME COURT.

Chandran Nair for the appellants.
P.S. Gill for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): The respondent/plaintiff Baskaran s/o Doraisamy applied under O.81 r.1 Rules of the High Court, 1980 by way of Summons-in-Chambers for the rescission of an agreement between him and the appellants/defendants Ganesan and Ramalingam and for the forfeiture of a sum of $20,000, a deposit paid by the appellants under an agreement dated February 11, 1983. The application by the respondent was founded on the ground that the appellants had no defence to his action.

The learned Judge heard the application in Chambers and dismissed it. However, after hearing further arguments under O.56 r.2 of the Rules of the High Court in open Court he reversed the decision and allowed the application with costs. He ordered the rescission of the agreement, the delivery up of vacant possession of the property and damages for wrongful occupation of the property. The memorandum of transfer deposited with the solicitors concerned was to be returned to the respondent as it was declared null and void.

The learned Judge correctly took the view that the respondent's case revolved round certain clauses of the agreement, in particular clauses 2, 3, 5, 6 and 12. For convenience they are reproduced hereunder:

"2. The balance of the purchase price amounting to Ringgit Fifty thousand (M$50,000) only shall be paid by the Purchasers to Messrs. Y.K. Saw & Co., of No. 31-A, First Floor Jalan Tengku Kelana, Kelana, Selangor within five (5) months from the date of execution of this Agreement. The said Solicitors are hereby authorised to utilise part thereof to pay off the balance of the loan to D & C Bank, Kuala Lumpur, to secure the discharge and custody of the Title Deed and the balance after deduction thereof shall only be paid to the Vendor upon presentation of the Transfer to the Land Office, K.L. for registration.

3. The Purchaser shall be entitled to borrow a loan from Bank/financial institution to finance the purchase of the said property PROVIDED ALWAYS that the date of completion as set out in clause 2 hereof shall always be strictly adhered to by the purchasers.

. . .

5. In the event that the Purchasers fail to pay the balance of the purchase price pursuant to clause 2 hereof, the deposit of Ringgit Twenty thousand (M$20,000) only shall be forfeited by the Vendor as liquidated damages and this Agreement shall become null and void and both parties shall make no further claim against each other.

5(b). In the event that the Purchasers fail to pay the balance of the purchaser price pursuant to clause 2 hereof, the purchaser undertakes to give vacant possession with immediate effect.

6. In the event that the Vendor shall fail to complete this transaction for any reason whatsoever the Purchaser shall, unless there are express provisions hereinafter contained to the contrary, be entitled to the remedy at law for specific performance and all costs and expenses incurred in by the Purchaser in connection therewith shall be borne and paid by the Vendor including the Purchaser's Solicitor's costs on a Solicitor's and client's basis PROVIDED ALWAYS that nothing herein contained shall in any way effect or prejudice any other rights or remedies which the Purchaser may have in law.

6(b). The Vendor hereby undertake to refund all sums received herein to the Purchasers in the event that the State Authority refuse to approve the Transfer or the transfer cannot be registered in the relevant Land Office for whatever reasons.

. . .

12. Time wherever mentioned in this agreement shall be deemed to be essence of the contract."

Having considered them, the learned Judge formed the view that as the appellants had failed to pay the balance of the purchase price within the time limit provided the respondent's solicitors therefore properly issued a notice (July 26, 1983) to the appellants invoking clause 2 of the agreement which required the appellants to pay the balance of the purchase price within 5 months from the date of the execution of the agreement. He also formed the view that as time was the essence of the contract the respondent had properly invoked clause 5 of the agreement to forfeit a sum of $20,000 and to terminate the agreement.

In the same notice the respondent also asked the appellants to deliver up vacant possession. The appellants refused to deliver up vacant possession

contending that at the time the agreement was executed the respondent had orally agreed to obtain the consent of the Ruler-in-Council to transfer the title to them to enable them to obtain the housing loan from a financial institution. Alternatively, the appellants contended that as the title was endorsed with the restriction in interest to the effect that –

"the land hereby alienated shall not be transferred without the consent of the Ruler-in-Council"

there was an implied condition that the agreement could only be concluded upon obtaining the consent of the Ruler-in-Council and the respondent's failure to do so despite repeated requests entitled them to treat the agreement as having been rescinded, in which event the respondent was to refund the deposit to them and they would in turn deliver up vacant possession to the respondent.

In the Court below counsel for the appellants submitted that although ordinarily in a contract of this nature where the mode and times of payment have been stipulated, the stipulation has to be complied with, but argued that in the instant case the terms of the agreement were such that evidence of oral undertaking by the respondent at the time of the execution of the agreement, namely, that the respondent was to obtain necessary consent of the Ruler-in-Council before the stipulation contained in clause 2 could take effect, was relevant and admissible under sections 91 to 92 of the Evidence Act. It is the appellants' contention this oral undertaking did not contradict, vary, add to or subtract from the terms of the written agreement.

The learned Judge found no merit in the argument. He formed the view that obviously such evidence would *per se* contradict and vary the unambiguous terms of clauses 2, 5 and 6. He rejected the appellants' contention that the restriction in interest appearing in the document of title constituted an implied term and that the agreement could not be concluded unless the consent of the Ruler-in-Council was obtained. He also rejected the argument that the respondent's failure to comply with such term prevented the purchase of the property from going through and it also went to the root of the matter on the authority of *Yong Ung Kai* v. *Enting*.[1]

The learned Judge distinguished *Yong's* case from the present case forming the view that – (a) sub-clause (b) of clause 6 envisaged the possibility of the transfer being refused by the Ruler-in-Council in which event provision was made for the refund of all sums received by the respondent; and (b) it was obvious from clause 2 that payment of the balance of the sum of $50,000 within five months from the date of the execution of the agreement was to enable the respondent's solicitors to utilise part of the sum to secure the release of the title deed from the respondent's bank for purposes of effecting a transfer. And the balance of the purchase price was to be held by the respondent's solicitors pending a transfer by registration. And it was only after the registration that the respondent was to be entitled to the payment of the balance sum remaining with his solicitors.

The learned Judge concluded that since clause 2 provided that time, wherever declared, was to be the essence of the contract, and clause 3 provided that the time frame was to be strictly adhered to, the appellants had therefore failed to raise a triable issue. A number of grounds were set out in the memorandum of appeal. It will suffice if we direct our attention to grounds 2, 3 and 4 as follows:

"2. The learned Judge erred in law and in fact when he failed to direct his mind to the fact that any agreement in respect of a piece of land on which there was an express restriction against transfer without the consent of the Ruler-in-Council must necessarily be a conditional agreement the fulfilment of which condition would be a prerequisite to its consequent completion.

3. The learned Judge failed to give adequate consideration to the fact that notwithstanding the omission in the agreement of an express provision to the effect that it was conditional to the obtaining of the necessary consent it was nevertheless an implied condition which had to be first complied with before the intention of the parties could be fruitfully achieved.

4. The learned Judge was wrong in law when he concluded that evidence relating to the obtaining of the approval and consent of the Ruler-in-Council by the plaintiff would be inadmissible under sections 91 and 92 of the Evidence Act as this evidence would in effect be evidence of the factual background known to the parties being primarily the genesis of the transaction envisaged which the Courts have consistently accepted as evidence that may be introduced without contradicting sections 91 and 92."

We would first of all refer to the pleadings. The appellants specifically pleaded in their defence that collateral to the Sale/Purchase Agreement, the respondent orally promised that he would obtain the necessary consent from the Ruler-in-Council for the transfer of the title to enable them to apply for a housing loan from a financial institution.

They also pleaded that the Sale/Purchase Agreement was subject to the implied condition. In view

of the restriction attaching to the transfer of title, the Sale/Purchase transaction was to be concluded only upon the obtaining of a letter of consent from the Ruler-in-Council. The appellants also affirmed to that effect in the affidavit in reply to the respondent's affidavit-in-support of the application for rescission of the agreement and the forfeiture of the deposit.

The pleadings, in our view, clearly raise a question of the consent of the State Authority for a transfer. The question emerges for reason that there is in force upon the title a restriction against a transfer without such a consent. That being the case, evidence which relates to the existence or otherwise of a promise or an oral undertaking concerning the written agreement and which may constitute a condition precedent to the attaching of an obligation under such agreement becomes relevant. Now whether or not the respondent did give such oral undertaking is a question of fact and a decision shall have to be made. A finding shall also have to be made whether such an undertaking constituted a condition precedent making it obligatory on the part of the respondent to secure the necessary consent to their further performances by the appellants of their obligation under the agreement.

In the present case it is not in dispute that the document of title contains an indorsement showing a restriction in interest, a restriction against any transfer without prior consent of the State Authority. It is also not in dispute that prior approval of the Ruler-in-Council had to be secured. At any rate the respondent himself did not dispute these facts. The only affidavit disputing the appellants' allegations that the respondent had given an oral undertaking came from Paramjit Singh Gill the respondent's solicitors. He affirmed to the effect that the respondent never agreed at any time that he would arrange or be responsible for the consent of the Ruler-in-Council for the transfer of the title, and as the respondent was residing in Kedah he was in no position whatsoever to attend to any application for such consent.

In this regard the Court below had probably not attached any weight to the respondent's solicitors' averment since they were matters which apparently were within the personal knowledge of the respondent. There was no reason given anywhere for the respondent's failure to affirm an affidavit disputing the appellants' allegations and to state firmly that he did not give such an oral undertaking or had never agreed to arrange or be responsible for the consent.

We reiterate that in respect of the land the subject-matter of the agreement there was in fact a restriction in interest endorsed against a transfer without the consent of the Ruler-in-Council (Q.T. Register Dist. of Kuala Lumpur No. Q.T.(R) 8199 State of Selangor) to the effect that

> "the land hereby alienated shall not be transferred without the consent of the Ruler-in-Council."

In view of the foregoing, the central question that arises for determination is whether the respondent did orally promise that he would obtain the consent of the Ruler-in-Council necessary for the transfer. Clause 6(b) of the agreement which seems to support the appellants' allegation, at any rate, appears consistent with their contention that there was the question of the respondent's oral promise which called for determination. And if the respondent did give the oral promise, the further question that called for determination was whether it was a term or condition precedent. In law therefore, there is an issue to be tried.

The further question that calls for our consideration is whether evidence of oral undertaking is relevant and admissible. The learned Judge referred to clause 6(b) of the agreement and formed the view that evidence relating to oral agreement would *per se* contradict and vary the unambiguous term of clauses 2, 5 and 6. With respect we disagree. Such a finding cannot in the light of proviso (c) to section 92 of the Evidence Act be upheld. The proviso reads –

> "(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved."

Basically, it is the appellants' contention that there was a separate oral agreement which constituted a condition precedent in that it imposed an obligation upon the respondent under the agreement, namely, to obtain the approval of the Ruler-in-Council for a transfer. It is the appellants' further contention that evidence of separate oral agreement is clearly admissible under proviso (c) of section 92 of the Evidence Act. We are constrained to say there is merit in the argument. Proviso (c) of section 92 of the Evidence Act clearly provides that the existence of an oral undertaking may be proved. It may well be that the onus is on the appellants to prove the existence of such an oral undertaking, but that is hardly the point. What

matters is that clearly the appellants were permitted in law to adduce evidence to prove the existence of such a promise. And in the event of a finding that there was such an oral undertaking that emanated from the respondent, the appellants, having entered into the agreement on the strength of such a promise, were entitled to rely on that promise. (See *City and Westminster Properties (1934) Ltd.* v. *Mudd*[2]).

It is our judgment therefore that there were issues which must be resolved at the trial. These issues are either of law or fact or both and certainly are not matters which can be decided on affidavit evidence.

In consideration, we see no justification for the learned Judge to hold that no triable issue had been raised. Accordingly, this appeal is allowed with costs.

The order made by the learned Judge in terms of the application should be set aside and substituted therefor an order dismissing the application.

Order accordingly.

Solicitors: *Thevin Chandran Siva & Chong; Gill & Tang.*

PEMBANGUNAN MAHA MURNI SDN. BHD. v. JURURUS LADANG SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) September 17 & December 28, 1985]

[Kuala Lumpur – Supreme Court Civil Suit No 121 of 1985]

Contract – Sale of land – Commission for professional services as broker – Custom – Judicial notice – Interest on amount awarded.

Evidence – Judicial notice – Custom – Evidence Act 1950, ss. 57 & 58.

In this case the respondent claimed the sum of $960,000 from the appellant as the brokerage fee or commission of 3% of the total purchase price of real property in Pahang. The learned trial judge concluded that there was an implied contract to pay the respondent the commission or brokerage as a broker for their involvement in the successful purchase of the land by the appellant. The question arose whether it is customary that such commission was payable at 2% of the purchase price. Respondent's counsel appeared to have conceded that "3% is not in accordance with the customary payment." The learned judge therefore awarded commission at the rate of 2%. The appellant appealed and the respondent cross-appealed on the quantum and on the omission to award interest.

Held: (1) the learned judge was correct in deciding on the question of fact that there was an implied contract to pay the respondent or brokerage as a broker;

(2) in view of the concession by respondent's counsel, the learned Judge was correct in awarding commission at 2% but it is clear that he had inadvertently omitted to award interest on the sum. The cross-appeal should therefore be allowed, in part.

Cases referred to:

(1) *Raja Rama Rao* v. *Raja of Pittapur* 45 I.A. 148, 154-155.
(2) *Tong Lee Hua* v. *Yong Kah Chin* [1979] 1 M.L.J. 233.
(3) *Tong Lee Hua* v. *Yong Kah Chin* [1981] 2 M.L.J. 1, P.C.
(4) *Bow's Emporium Ltd.* v. *A.R. Brett* [1928] 44 T.L.R. 194.
(5) *Chew Teng Cheong & Anor* v. *Pang Choon Kong* [1981] 1 M.L.J. 298.
(6) *Tang Chiok Sing* v. *Lian Fatt Saw Mill Co* [1976] 2 M.L.J. 241.

SUPREME COURT.

Robert Lazar for the appellant.

J.J. Puthucheary (L.R. Ratnam with him) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): In the Commercial Division of the High Court, Kuala Lumpur, the respondent/plaintiff claimed the sum of $960,000 from the appellant/defendant as the brokerage fee or commission of 3% of the total purchase price of real property known as Block 8 Keratong in the State of Pahang (Block 8) which the appellant purchased from the registered owner as a result of the alleged professional services of the respondent as broker. The trial Judge gave judgment for the respondent not for the full amount claimed but for the sum of $460,000 calculated at 2% of the total purchase price. The appellant being dissatisfied with the said decision, has now appealed. There is also a cross-appeal by the respondent for the inclusion of the award of interest at 8% per annum with effect from March 19, 1981 till the date of judgment which the learned Judge has omitted to award.

Originally the appellant filed six grounds of appeal, but later abandoned the first three grounds